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United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
Fifth meeting
7-11 June 2004

Strengthening of flag State implementation

Submitted by the Secretariat of the International Maritime Organization (IMO)

1. In paragraph 28 of its resolution 58/240, the General Assembly invited the International Maritime Organization (IMO) and other relevant competent international organizations to study, examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. A similar invitation is contained in paragraph 22 of Assembly resolution 58/14 on sustainable fisheries, including the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments.

2. At its ninety-second session, which is to be held from 21 to 25 June 2004, the Council of IMO will consider the invitation contained in both resolutions and decide as appropriate.

3. The following paragraphs contained a summary of the main features of the mandate and work of IMO regarding the strengthening of flag State jurisdiction. This document should be read together with the report of the Inter-Agency Consultative Group on Flag State Implementation, which met in Paris on 7 May 2003 (see: http://www.un.org/Depts/los/general_assembly/documents/flagstateimpl.pdf).

Background on the mandate of the International Maritime Organization

4. Since 1959, IMO, the sole specialized agency of the United Nations exclusively devoted to maritime affairs, has developed comprehensive multilateral treaties imposing, primarily upon the flag State, a wide range of technical measures designed to improve the safety of shipping and prevent marine pollution from ships. Parenthetically, measures of port State control are also regulated in IMO treaties

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aimed at preventing and correcting deficiencies in the exercise of flag State jurisdiction.

5. The most important IMO treaties are implemented worldwide by States representing together between 95 and 99 per cent of the gross tonnage of the world's merchant fleet.

6. Since 1973, the Secretariat of IMO (at that time the Intergovernmental Maritime Consultative Organization (IMCO)) actively contributed to the work of the Third United Nations Conference on the Law of the Sea in order to ensure that the development of IMO instruments conformed to the basic principles guiding the development of the 1982 United Nations Convention on the Law of the Sea. Although IMO is explicitly mentioned in only one of the articles of the Convention (article 2 of annex VIII), several provisions in the Convention refer to the "competent international organization" for the adoption of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from vessels and from dumping at sea.

Strengthening of flag State jurisdiction: the question of genuine link

7. Bearing this background in mind, IMO's mandate should be related to the concept of the "genuine link" requirement regulated by the Convention on the Law of the Sea in article 91(1) in an operative way, to be established in strict connection with the subject matters regulated by article 94(1) of the Convention as internationally binding conditions for the effective exercise of flag State jurisdiction.

8. The exercise of flag State jurisdiction on technical matters related to safety of navigation and prevention of marine pollution is exclusively within the mandate of IMO. Since the inception of its activities, the organization has continuously reaffirmed its mandate in this regard through the development of treaties and initiatives that have resulted in the strengthening of flag State implementation, up to the point that almost all technical rules and regulations applicable on board ships engaged in commercial navigation worldwide are binding and self-executing through provisions contained in IMO treaties and codes.

9. IMO's mandate in the field of flag State jurisdiction is complemented by the work of other international organizations on subject matters that, while not regulated by IMO, clearly involve the exercise of flag State jurisdiction in furtherance of the paramount objectives to be achieved through the operation of both articles 91(1) and 94 of the Convention on the Law of the Sea. In this regard, particular mention should be made of article 94(1) with reference to the need to exercise flag State jurisdiction and control in connection with social matters that are clearly within the purview of the International Labour Organization (ILO). The existence of the genuine link requirement in connection with the exercise of flag State jurisdiction also involves the Food and Agriculture Organization of the United Nations (FAO) in connection with the catching operations of fishing vessels.

10. Therefore, a comprehensive assessment of the implementation of the aforementioned articles of the Convention on the Law of the Sea can only be undertaken in cooperation with other interested agencies.

11. Article 91(1) of the Convention on the Law of the Sea acknowledges the right of every State to "fix the conditions for the grant of nationality and for the right to fly its flag". It is in this regard that the application of technical rules and regulations to implement safety and anti-pollution measures have, in the case of IMO, been strictly dissociated from the concept of ownership, which the Convention clearly seems to acknowledge as a subject matter of domestic law beyond its purview.

12. It follows that safety and anti-pollution rules and regulations do not depend for their proper implementation on the concept of ownership. On the contrary, the main requirement for this proper implementation is the existence of a maritime administration able to effectively supervise compliance with IMO rules, regulations and standards. In this regard, the need for expertise and resources to establish effective maritime administrations should be seen as a consequence of IMO's work. Thanks to the wide adherence to IMO treaties, commercial shipping is a highly regulated industry, and one which is required, under international maritime law developed under the aegis of IMO, to comply with strict safety and anti-pollution measures.

13. The treaty law obligations imposed upon 95 to 99 per cent of the world's merchant fleet to comply with the ever-increasing demands for safer and more secure ships and cleaner oceans contained in IMO treaties has led to a situation where all States, irrespective of the features of their ships' registries, must ensure that ships flying their flag apply IMO rules, regulations and standards as a sine qua non prerequisite to trade. Statistics show that cases of non-compliance are not related to the ship register features but to the effectiveness of the supervisory role (or lack thereof) exerted by the maritime administrations concerned.

14. IMO submits that, within the present framework established by the Convention on the Law of the Sea and the mandate of the organizations invited to participate in the study of means to strengthen flag State implementation, two main factors must be borne in mind, namely:

(a) The elaboration of new international rules cannot be conceived as a means of counteracting the lack of proper implementation of existing ones. States and international organizations should primarily focus on the strengthening of existing implementation mechanisms, as IMO is doing at present, having placed particular emphasis on the development and subsequent implementation of a Member State audit scheme, which is intended to comprehensively assess the degree of conformance by a State to its obligations under the applicable IMO treaties;

(b) Questions relating to ownership of vessels should be considered as subject matters of an economic corporate nature that clearly fall beyond the purview of the law of the sea and the mandate of the international organizations as defined in the Convention on the Law of the Sea; in the view of IMO, what is important for the purposes of establishing a "genuine link" is to identify who assumes the responsibility for the operation and control of the vessel.

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United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
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Letter dated 24 May 2004 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General

As you are aware, the fifth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS V), to be held in New York from 7 to 11 June 2004, will consider issues involving the conservation and management of biological diversity in areas of the ocean beyond national jurisdiction.

The need for more effective conservation and management of the resources of the global ocean commons is an issue on which Australia has been focused for some time. This objective is consistent with the Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation), which called on the international community to maintain the productivity and biodiversity of important and vulnerable marine and coastal areas, including in areas within and beyond national jurisdiction.

In this context, I am pleased to note that Australia, as part of its commitment to the outcomes of the World Summit on Sustainable Development, and in partnership with a number of other States, international organizations and civil society, hosted an international workshop in Cairns in June 2003 to explore governance and legal arrangements for the conservation and management of biological diversity in high seas areas. A summary of the discussions held during the workshop is attached (see annex).

Given the focus of the UNICPOLOS V meeting, Australia believes that delegates to that meeting would find the outcome of the Cairns workshop to be of interest. While the outcomes of the a workshop do not necessarily reflect Australian Government policy, they do indicate the breadth of issues and considerations that need to be addressed in discussions on the conservation and management of biological diversity in high seas areas.

I therefore kindly request that the present letter and its annex be circulated as a document of the General Assembly for the information of delegates to UNICPOLOS V.

(*Signed*) John **Dauth**
Ambassador
Permanent Representative

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Annex to the letter dated 24 May 2004 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General

Workshop on the Governance of High Seas Biodiversity Conservation Cairns, Australia, 16-19 June 2003

Summary of Discussions and Suggestions for a Way Forward

Context

The Johannesburg Plan of Implementation from the World Summit on Sustainable Development (WSSD) called on the international community to *maintain the productivity and biodiversity of important and vulnerable marine and coastal areas, including in areas within and beyond national jurisdiction* (Paragraph 32a).

The United Nations General Assembly, in its Resolution 57/141:

Encourages relevant international organizations, with the assistance of regional and subregional fisheries organizations, to consider urgently ways to integrate and improve, on a scientific basis, the management of risks to marine biodiversity of seamounts and certain other underwater features within the framework of the United Nations Convention on the Law of the Sea.

The Workshop in Cairns, Australia, was a WSSD partnership initiative sponsored by the Government of Australia in cooperation with partners from the Governments of Canada, the United Kingdom, Cambodia, New Zealand, and the United States of America as well as the World Conservation Union (IUCN), the World Wide Fund for Nature, the International Oceans Institute, Humane Society International the International Maritime Organization, the International Seabed Authority and the Food and Agriculture Organization.

The workshop was attended by over 150 participants from 36 countries, intergovernmental organizations (including the Convention on Biological Diversity, Secretariat, the Convention on Migratory Species Secretariat, the United Nations Division of Ocean Affairs and Law of the Sea, the Food and Agriculture Organization, the International Maritime Organization, the International Seabed Authority, the Secretariat of the Pacific Community, the South Pacific Regional Environment Programme and the United Nations Environment Programme), nongovernmental organizations, industry representatives and academic institutions. Participants represented a broad range of scientific, legal, policy, technical and industry expertise on high seas and deep oceans biodiversity. Individuals were invited for their expertise and interest in high seas biodiversity and deep oceans management.

The views expressed in these summary conclusions are a reflection of the broad range of discussions at the meeting, greater international awareness and attention being paid to high seas issues in recent years and the increasingly urgent need for cooperative action by the international community to improve conservation and management of the high seas and deep oceans.

Noting the breadth of participants at the meeting, the suggestions for action were broad-ranging and are not intended to reflect agreed positions amo..g all participants. They do, however, indicate the extent of possibilities for action which could be negotiated and further discussed by the international community to meet its collective commitment and obligation to conservation and sustainable management of the ocean commons.

While fishing currently has the major impact on the biodiversity of the deep oceans, the workshop acknowledged and discussed a range of other activities that may have potentially damaging impacts, including the laying and operation of submarine cables and pipelines, marine scientific research and bio-prospecting, whaling, military activities, ocean dumping and disposal, the spread of marine debris, introduced marine pests and mineral exploration.

The institutional and legal governance frameworks for the high seas, and the management arrangements which flow from them, need to contemplate the variety of current and potential activities and be flexible enough to accommodate change arising from emerging technologies, increasing scientific knowledge and greater understanding of the interactions between use, management and sustainability.

While the lack of understanding of the biodiversity and dynamics of the high seas continues to be a major impediment to developing appropriate institutional, legal and management responses for conservation and sustainable management, there is a corresponding need for greater and applied oceans governance research.

Awareness of the problems and capacity to address them, both technical and financial, is fundamental to any change in the legal and institutional governance structures which provide the basis for management and conservation activities in the high seas.

Discussions took place in the context of the already established principles of integrated and ecosystem based oceans management, the precautionary approach and intergenerational equity. There is a need, however, to reach agreement on the practical implications of these normative principles. (It is also important to note that international agreement has not been reached on the legal status of these concepts.)

Discussion of Options and Activities

The workshop was characterized by frank and free flowing discussion. Many considered this useful in order to stimulate debate among participants. However it is worth noting in this summary the delicate international balance of rights and responsibilities in areas outside national jurisdiction. Examples of this balance were discussed, such as: the extent that freedom of the seas should or could be limited in relation to conservation measures; freedoms of navigation in relation to high seas marine protected areas; freedoms of access to high seas biodiversity versus common heritage; and equitable sharing of resources and benefits.

Given the nature of high seas jurisdictional arrangements and the legal and institutional frameworks with competency/mandates in the high seas, the key to the effective long term governance of the high seas and deep oceans is raising awareness of the issues and problems and multilateral cooperation and action – at the international, regional and sub-regional levels. Adaptation or changes to existing governance arrangements, or the establishment of new approaches to provide for improved management and conservation outcomes can, however, be a lengthy process. Consequently the workshop contemplated the need for short term responses that would provide a basis for improved conservation and management on an immediate and interim basis while governance options for medium and longer term approaches to sustainability are developed and agreed.

The following is indicative of matters raised in reports back from the meeting's working groups. The detail of the working group discussions is contained in the full Meeting Record.

Short Term Options

- United Nations General Assembly (UNGA) resolution for a moratorium on destructive fishing practices, such as unregulated bottom trawling on and around seamounts, cold water corals and other vulnerable underwater features but also pelagic resources of the high seas;
- UNGA resolution related to shipping
    - setting forth criteria for establishing the genuine link between vessels and flag states and the consequences for failure to meet those obligations under the United Nations Convention on the Law of the Sea (UNCLOS) and other agreements;
    - establishment of a voluntary audit scheme to independently assess flag states' ability to implement their obligations under UNCLOS and other agreements;
- Immediate establishment of an appropriately resourced coordination and cooperation mechanism within the UN system;
- Urgent capacity building for developing countries and small island developing states, including through their participation in the decision-making processes of relevant regional and international fora and mobilization of appropriate financial and technological resources;
- Publicity and public awareness raising of the value, importance and activity in the deep oceans;
- Development of a pilot high seas marine protected area site;
- Increased applied scientific and governance research;
- Relevant international institutions should identify a focal point on biodiversity of the high seas and deep oceans;
    - DOALOS should convene an inter-agency working group on high seas biodiversity under a broader oceans coordinating mechanism; and
- UNGA to call upon relevant international organizations, including the International Seabed Authority, the International Hydrographic Organization, DOALOS and the CBD Secretariat to review issues relating to the conservation and sustainable use of genetic resources of the deep seabed beyond the limits of national jurisdiction and to make recommendations to the General Assembly on these issues.

Medium to longer term institutional and governance options

Legal

- Develop agreement(s) to implement the environmental and conservation obligations of UNCLOS to ensure the protection, conservation and sustainable use of marine biodiversity and ecological processes;
- Amend other Conventions relevant to high seas biodiversity such as MARPOL Annexes I (oil), II (noxious liquid substances), IV (sewage) and V (garbage) to ensure that restrictions on nearshore discharges do not adversely impact biodiversity by transferring discharges to the high seas;
- Amend the World Heritage Convention to extend designations to high seas;

- Address historic dumping issues under the London Convention in relation to liability, compensation and containment/clean up;
- Urgently address the problems of flags of convenience and the primacy of flag state jurisdiction on the high seas;
- Promote increased ratification, implementation and enforcement of international, regional and sub-regional agreements;
- Amend the Convention on Biological Diversity to provide a framework for the establishment of marine protected areas and ecosystem-based management for the oceans and seas beyond national jurisdiction; and
- Develop a framework to address bioprospecting and other activities not specifically regulated by current agreements or institutions to ensure incorporation of relevant environmental obligations and governance principles (for example, the application of the precautionary approach, equity and stakeholder participation).

Institutional

- Encourage IMO and member states to make greater use of existing IMO measures such as Special Areas and particularly sensitive sea areas and to develop new measures, where appropriate, to protect high seas biodiversity and ecological processes;
- Expand the work of the International Seabed Authority to develop regulations beyond exploration and mining in the Area, including the designation of conservation zones and bioprospecting activities, and develop an international regime for deep seabed bioprospecting in areas beyond national jurisdiction based on the principles and objectives of the Convention on Biological Diversity and the UNCLOS;
- DOALOS, in coordination with IMO and FAO to define the 'genuine link';
- establish or improve national, regional and global inter-agency coordination and cooperation mechanisms to ensure effective management or control of activities affecting marine biodiversity within and beyond national jurisdiction;
- Better coordination between Conventions and Instruments (for example, the Convention on Migratory Species could identify migratory corridors to be protected by regional fisheries management organizations (RFMOs) and PSSAs);
- Use the Convention on the International Trade in Endangered Species (CITES) to address illegal, unregulated and unreported (IUU) fishing in relation to species of particular concern;
- New RFMOs for exclusively high seas stocks;
- RFMOs to establish protected areas;
- Regional coast-guards;
- A World Oceans Organisation/central authority for environmental management of the oceans;
- A deep sea-bed bioprospecting authority or Global Biotechnology Commission; and
- Creation of an Oceans 'Interpol'.

Science and Research

- IOC to act as a coordination body between the scientific and oceans policy communities;
- Detailed analysis and assessments of current convention regimes including implementation constraints;
- Identification of an appropriate governance regime of bioprospecting;
- Analysis of RFMOs' implementation and enforcement experiences and constraints;
- Establishment of a Global and Regional Ocean Governance Research Networks to support better informed decision making;
- Establishment of a Global Marine Assessment to include high seas biodiversity issues; and
- Identification of vulnerable marine ecosystems, specifically candidate sites for marine protected areas.

Education and Capacity Building

- Better implementation of capacity building obligations in existing agreements;
- Increased training in the legal, science and policy areas related to high seas biodiversity conservation;
- Raising awareness through regional workshops and use of electronic learning tools (particular mention was made of the 'virtual high seas site' developed for this workshop);
- Development of a global oceans governance education network;
- Establish effective maritime administrations; and
- Implementation of flagship projects to focus attention on the problems and issues (for example, the effects of marine debris on sea birds and other marine life).

Other ideas

- Development of a Global Oceans Policy; and
- Creation and appointment of a Global Oceans Ambassador.

Next Steps

The workshop was a contribution to the 'intellectual capital' necessary to build momentum for change in the way the international community conserves and manages the biodiversity of the ocean commons. Participants were encouraged to identify key related fora in the near and medium term to continue the development of thinking on the types of issues discussed and the actions needed to conserve and manage the unique environment of the high seas and deep oceans.